Nos. 90-1262, 90-1266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF ARKANSAS, *et al.*,
Petitioners,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

STATE OF OKLAHOMA, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS IN No. 90-1262

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REPLY BRIEF OF PETITIONERS

Respondents and their amici devote most of their briefs to refuting a position the Arkansas petitioners never take. In particular, they characterize Arkansas as contending that downstream state standards can be ignored and "have no bearing" in permit decisions, and they then attack this "Arkansas interpretation" as one-sided and contrary to the goals of the Clean Water Act (CWA). *See, e.g.*, Okla. Br. at 19; Illinois Br. at 12-13; NRDC Br. at 14. This characterization is simply wrong, and as a result, most of respondents' analysis fails to address the issues actually before this Court.

The Arkansas petitioners' opening brief demonstrated that Congress meant in 1972 to establish a balance between the interests of upstream and downstream states. Pursuant to this balance, section 402 of the CWA does require EPA and source state permitting agencies to *consider* the standards and objections of downstream states, and EPA can use its final veto authority to assure that downstream states are treated reasonably. CWA §§ 402(b)(5), 402(d)(2), 402(a)(3). At the same time, these provisions also show that downstream state standards are *not* directly applicable to out-of-state sources, and they expressly grant permitting agencies the discretion *not* to impose additional conditions for achieving the downstream standards. *See* Ark. Br. at 13-17. The plain language of these controlling provisions, and this Court's interpretation of these provisions just four years ago in *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 490-91, 497 (1987), therefore foreclose the Tenth Circuit's contrary view, which makes downstream state standards automatically applicable and eliminates all permitting agency discretion.

Whether as a consequence of their "strawman" strategy or of necessity, respondents virtually ignore section 402, this Court's holding in *Ouellette*, and a number of other grounds given by EPA and Arkansas for reversal of the Tenth Circuit's decision. Moreover, the goals that respondents invoke and the other arguments they do pre-

sent in no way justify overturning *Ouellette* and making downstream state standards apply automatically to facilities in upstream states. *See infra* Section I. But even if the Oklahoma standards were somehow applicable, EPA still acted well within its discretion to issue the Fayetteville permit here, and the Tenth Circuit's decision must be reversed. *See infra* Section II.

I. THE CWA GIVES EPA DISCRETION WHETHER TO IMPOSE ADDITIONAL RESTRICTIONS TO PROTECT DOWNSTREAM WATER QUALITY.

A. The Goals Of The Act Do Not Support Respondents' Statutory Construction.

Although respondents and their amici repeatedly invoke the "goals" of the Clean Water Act, neither those goals nor the statute as a whole can support their interpretation of the Act. In fact, despite their efforts to arrogate the mantle of reasonableness, respondents and their amici are the ones advocating an extreme approach for the resolution of interstate disputes, as shown both by the facts of this case and the consequences of their statutory construction.

After considering all the evidence, EPA found that the Fayetteville discharge into tributaries of the Illinois River would have no adverse effect on Oklahoma water quality. Due to the high rate of assimilation in Arkansas (about 75%), EPA concluded that the Fayetteville discharge would increase the river's total phosphorus level by no more than six pounds per day at the Oklahoma border. Ark. P.A. 129a. Moreover, since those six pounds were diluted in an additional 3.5 million gallons of water each day, the Fayetteville discharge as a whole would actually *improve* Oklahoma water quality, by increasing the river's assimilative capacity for nutrients and diluting the pre-existing phosphorus concentrations at the border.[1]

[1] The pre-existing phosphorus concentration at that point was approximately 0.4 mg/l. Memorandum from Martin Maner, R., Vol. IX, Dkt. No. ARK-6 (part 3), Ark. Ex. 10. Since the six pounds of phosphorus from the Fayetteville discharge that reach the

Although phosphorus was the pollutant of greatest concern at the hearings, EPA also found that the Fayetteville discharge would improve dissolved oxygen levels at the Oklahoma border, and even Oklahoma's primary expert witness conceded during the hearings that "there will be no change in terms of algae growth, taste, odor and turbidity." Ark. P.A. at 134a, 139a. *See generally* Ark. P.A. at 127a-144a.

By comparison, Fayetteville's prior treatment plant was not nearly so effective, and as Oklahoma admits, had become a serious detriment to river quality and the environment. In addition, with the growth of the area, Fayetteville concluded that even a new state-of-the-art facility could not solve these problems if it continued discharging all its effluent into the White River. Ark. Br. at 4. Accordingly, the split-flow design Fayetteville ultimately selected, which combined the assimilative capability of the Illinois River tributaries in Arkansas and the White River, was essential for minimizing the facility's overall impact.[2]

EPA's issuance of a permit based on this split-flow design was thus the only rational alternative from an environmental standpoint, and for the reasons shown above, the decision certainly did not protect Arkansas' water quality "at Oklahoma's expense," notwithstanding Oklahoma's rhetorical premise. *See* Okla. Br. at 1, 6-7.

border are diluted by the 3.5 million gallons of water added by the plant's discharge, the maximum phosphorus concentration in the Fayetteville effluent reaching the border would be less than 0.25 mg/l. *See* Ark. P.A. at 128a-129a; J.A. at 67; R., Vol. VII, Dkt. No. C-1 (Vol. II), at 316. In fact, the Fayetteville plant discharges less phosphorus than the permit maximum assumed in these calculations.

[2] Ark. Br. at 4-6. Respondents' suggestion that Fayetteville could readily have chosen a complete "land application" alternative is unfounded. *See* Okla. Br. at 7. In fact, Fayetteville did study this alternative, and the City was unable to implement this approach (beyond its current use) for a variety of reasons, including the City's inability to enter agreements with sufficient neighboring landowners to handle the additional wastewater. *See also* Ark. P.A. at 115a n.11.

This conclusion is even more obvious from a broader regional perspective, since improvements underway at three other Arkansas facilities nearer the border were expected to reduce phosphorus discharges into the Illinois River by about 400 pounds per day, easily offsetting the six pounds added by Fayetteville. *See* Ark. P.A. at 128a, 132a, 153a; EPA Br. at 9 n.10.

The Tenth Circuit's invalidation of the Fayetteville permit, despite these facts, itself demonstrates the extreme nature of the court's holding. The defense of that holding by respondents and their amici similarly reveals the extreme statutory interpretation required to support that holding and its consequences for the rest of the nation. Specifically, they contend that: (i) a discharger must automatically comply with the standards of all downstream states; (ii) downstream states can adopt standards that preclude any new discharges in upstream states; (iii) EPA has no authority to disapprove a state standard that is more stringent than federal minimum requirements; and (iv) EPA and state permitting agencies have no discretion in interpreting or applying downstream standards with respect to upstream sources. *E.g.*, Okla. Br. at 6, 31-32; NRDC Br. at 22. In their view, Oklahoma has the complete and unfettered ability to ban unilaterally all new discharges into most of the waterways of Northwest Arkansas, which eventually flow into Oklahoma. *Id.*

Respondents base this wooden construction almost exclusively on the CWA's goal of eliminating all discharges by 1985. As laudable as that goal may be, Congress recognized from the outset that this goal was aspirational rather than operational.[3] No state, including Oklahoma, can achieve this goal, now or in the immediate future, and neither EPA nor any court other than the Tenth

[3] As Senator Muskie, the Senate sponsor of the provision, explained: "[T]he 1985 deadline for achieving no-discharge of pollutants is a policy objective. It is not locked in concrete. It is not enforceable." 117 Cong. Rec. 38,800 (1971), *reprinted in* 2 Leg. Hist. of 1972, at 1262. *See also National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 178-81 (D.C. Cir. 1982).

Circuit has interpreted the goal in the manner proposed by respondents and their environmental interest group supporters.

Not only do respondents misperceive the nature of Congress' goals, but they also ignore the counterproductive and disruptive consequences of their extreme interpretation. As this Court recognized in *Ouellette*, Congress intended to establish a balance between upstream and downstream states, not to grant downstream states control over out-of-state sources. 479 U.S. at 490-91, 497. To maintain this balance, consistent with long-established principles of federalism and state equality, EPA and source state permitting agencies must have discretion regarding the application of downstream standards. As explained by the municipal leagues and other affected parties supporting Arkansas here, upstream sources would otherwise be required to comply with inconsistent and constantly changing standards from as many as ten downstream states.[4] Moreover, by eliminating EPA's role as a meaningful arbiter, respondent's view would interfere with the construction of environmentally improved facilities, as in this case, and even expose upstream sources to selective bans or discrimination.[5]

Consequently, the Tenth Circuit's and respondents' construction of the statute would actually interfere with, not serve, the goals of the statute.

[4] AMSA/Municipal League Br. at 8-12; Nevada Br. at 15-16; Colorado Br. at 13-14; Champion Br. at 6 & n.5; Ark. Br. at 29-30.

[5] *Id.* Although denying any discriminatory intent, Oklahoma has adopted much more lenient standards for downstream segments of the Illinois River where almost all Oklahoma dischargers are located. J.A. at 54. Furthermore, all five river segments designated as scenic rivers by the Oklahoma legislature, and thus subject to the most stringent "(a)" limitations on new discharges, happen to be adjacent to the Arkansas border. *See* 1982 Oklahoma Water Quality Standards (QWQS), App. A. R., Vol. X, Dkt. No. OK-6A, at 17. In each case, these classifications affect almost exclusively Arkansas sources since Oklahoma has adopted more lenient standards for virtually every downstream segment where its own dischargers are located.

B. The CWA Expressly Grants Permitting Agencies The Discretion To Arbitrate Interstate Disputes On A Case-by-Case Basis.

While dwelling on their singular view of the CWA's goals, respondents essentially ignore the statutory provision Congress enacted in 1972 that specifically governs disputes over interstate waterways. *See* Ark. Br. at 3, 13. This provision, which was added as section 402 when Congress created the NPDES program, controls the issuance of permits by both EPA and state permitting agencies, as respondents appear to accept. CWA §§ 402(b)(5), 402(a)(3). By its plain terms, this provision creates a consultative and *discretionary* mechanism that requires permitting agencies to consider, but not necessarily accept, the recommendations of downstream states regarding their standards. Section 402 also authorizes, but plainly stops short of requiring, EPA to veto a permit that fails to require compliance with downstream state standards. CWA § 402(d)(2).[6]

Although respondents themselves appear to concede the discretionary nature of these provisions, *see* Okla. Br. at 18 n.15, their environmental interest group supporters nevertheless suggest reading § 402(d)(2) as *compelling* EPA to veto permits that do not ensure compliance with downstream standards. NRDC Br. at 12-13. The words of the statute will not tolerate this reading. On its very face, this section is permissive and states that the permit

[6] *See* Ark. Br. at 14-15. Section 402(a)(3) makes the provisions of § 402(b)(5) directly applicable to EPA when it acts as the permitting agency, and in that situation, the consultative and discretionary procedures obviously merge. *See* Ark Br. at 15. Some of the relevant factors that EPA may consider in its case-by-case determinations include the relative hardships to the upstream and downstream states, the volume of the discharge, whether the discharge will violate downstream standards, the frequency and duration of any such violation, whether the downstream standards exceed the federal requirements, and whether the downstream state applies similar restrictions to sources in its own state. *Cf.* S. Rep. No. 50, 99th Cong., 1st Sess. 49 (1985), *reprinted in* 2 Leg. Hist. of 1987, at 1420, 1470.

shall be denied "*if* the Administrator . . . objects." CWA § 402(d)(2) (emphasis added). Moreover, it would be absurd to read this "if" as creating a mandatory duty for EPA when § 402(d)(3), the following subsection, expressly authorizes EPA to waive any review of a state permitting agency's decision not to follow a downstream state's recommendations. Not surprisingly, therefore, every other court of appeals interpreting § 402(d)(2) has concluded that EPA's decision to veto a permit is discretionary, not mandatory. *See* Ark. Br. at 14.

For their part, respondents suggest that instead of § 402, interstate disputes should be controlled by language in § 401(a)(2), an older provision that predates the NPDES program. In particular, this provision requires EPA to seek the views of downstream states and, based upon the "evaluation and recommendations" of the EPA Administrator, to condition permits "in such manner as may be necessary to insure compliance with *applicable* water quality requirements." CWA § 401(a)(2) (emphasis added). Respondents' reliance on this provision is misplaced for a number of reasons.

First, nowhere does § 401(a)(2) say that "applicable" requirements means all downstream state standards. Respondents simply assume that it does, thereby begging the question. In fact, the provision means that once EPA makes its case-by-case determination whether to treat a particular downstream standard as "applicable," the permit must ensure compliance with the ones EPA makes "applicable." Second, respondents' presumed meaning of "applicable" in § 401(a)(2) would conflict with the acknowledged meaning of the same word in § 401(a)(1), the preceding subsection. In that provision, "applicable" was deliberately limited to the standards set by the source state. Congress made this clear beyond question when it specifically decided against requiring a certification of compliance with downstream state standards under this provision.[7] Moreover, every court construing this provi-

[7] *See* Ark. Br. at 16-17 & n.16; *see also* Senate Consideration of the Conference Report, Oct. 4, 1972, *reprinted in* 1 Leg. Hist. of

sion has held, contrary to the implication of several amici (Sierra Club Br. at 7; Illinois Br. at 10), that it only requires a certification of compliance with source state standards.[8]

A third problem with respondents' attempted use of § 401(a)(2) is that this provision does not even apply when state agencies act as the permitting authority under section 402(b). *See* Ark. Br. at 16 & n.15. Respondents' construction would thus violate this Court's admonition that it makes no sense to construe the CWA as imposing different requirements depending on the "fortuitous circumstance" of whether EPA or a state acts as the permitting agency. *Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 196-97 (1980). Longstanding principles of statutory construction similarly militate against construing § 401(a)(2) to create this conflict with § 402. *See, e.g., Louisiana Pub. Service Comm'n* v. *FCC*, 476 U.S. 355, 370 (1986); *Adams* v. *Howerton*, 673 F.2d 1036, 1040 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982). Finally, even if § 401(a)(2) could only be read as creating this conflict, the permissive provisions in §§ 402(b)(5) and 402(a)(3) must nevertheless control in NPDES permitting decisions, since Congress enacted the latter provisions more recently and they serve as the specific legal authority for issuing NPDES permits in the first place.[9]

1972, at 161, 176 (exhibit of Sen. Muskie) (state certification is intended "to assure compliance with water quality standards *in that State*") (emphasis added).

[8] *See National Wildlife Fed'n* v. *FERC*, 912 F.2d 1471, 1483-84 (D.C. Cir. 1990); *Miners Advocacy Council* v. *State Dep't of Environmental Conservation*, 778 P.2d 1126, 1129 (Alaska 1989), *cert. denied*, 110 S. Ct. 1127 (1990); *Environmental Defense Fund, Inc.* v. *Tennessee Water Quality Control Bd.*, 660 S.W.2d 776, 779 (Tenn. Ct. App. 1983).

[9] Ark Br. at 15-16. *See* 2A C. Sands, *Sutherland on Statutes and Statutory Construction* § 51.02, at 453-54 (4th ed. 1984); *Watt* v. *Alaska*, 451 U.S. 259, 166 (1981) (more recent enactment prevails). In addition, it has long been accepted that a more specific provision

In sum, therefore, section 402 must be regarded as the governing provision, and rather than make downstream standards automatically applicable, this provision directs permitting agencies to determine on a case-by-case basis whether downstream state standards warrant imposing additional conditions in a permit.[10]

C. The Legislative History, EPA's Regulations, And *Ouellette* Further Confirm That Downstream Standards Are Not Automatically Applicable.

The legislative history of the CWA likewise demonstrates that Congress did not intend to make downstream state standards apply automatically to out-of-state facilities, as explained in Arkansas' opening brief. Ark. Br. at 19-24. In response, neither respondents nor their amici are able to cite any contrary evidence in the legislative history that actually addresses the interstate ap-

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preempts an inconsistent provision that is more general. *Brown* v. *General Services Admin.*, 425 U.S. 820, 834-35 (1976); *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701, 734-35 (1989). *See also MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944) ("However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling'" (quoting *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208 (1932))). Moreover, § 402 would also take precedence as the last provision in point of arrangement. *See, e.g.*, 2A C. Sands, *Sutherland on Statutes, supra*, § 46.05, at 92; *Lodge 1858, Am. Fed'n of Gov't Employees* v. *Webb*, 580 F.2d 496, 510 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978).

[10] Respondents and their amici also rely on section 301(b)(1)(C) to support their argument that downstream standards are automatically applicable. *See, e.g.*, Okla. Br. at 17. However, this provision does not address the issue of whether downstream standards apply to out-of-state dischargers, and respondents' reading again simply begs the question. *See* Ark. Br. at 17 n.17. Moreover, there is no suggestion in the legislative history that Congress intended § 301 to require the extra-territorial application of more stringent downstream state standards. In fact, the language and legislative history of § 510 demonstrates that such standards were to apply only to in-state dischargers. *See* Ark. Br. at 25-27.

plication of water quality standards. Under these circumstances, it is inconceivable that Congress could have adopted respondents' extreme interpretation, especially without expressly saying that it was doing so, given the extraordinary impact on state sovereignty and the substantial constitutional implications of allowing one state to regulate facilities in another state.[11]

In the absence of any legislative history sufficient to support their own interpretation, respondents merely cite the general statutory goals and complain that Arkansas' position would cause "interstate water quality to be set at the lowest common denominator." Okla. Br. at 19. What respondents ignore is that Congress chose other measures to address such concerns, and not the measure Oklahoma would prefer here. Specifically, Congress did require EPA to set uniform technology-based effluent limitations, which apply nationally, and granted EPA the authority to review source state standards for consistency with federal minimum requirements. These measures were purposefully crafted to ensure adequate protection of downstream water quality, and even then, Congress still gave permitting agencies the discretion to impose additional conditions in light of downstream standards.[12]

As another substitute for legislative intent, respondents contend that EPA's regulations support their extreme

[11] The extra-territorial application of state standards in this manner would require an "unmistakably clear" authorization from Congress. Ark. Br. at 31; Nevada Br. at 16. A clear congressional statement is required not only by these constitutional implications, but also by the rule that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotations omitted).

[12] *See* citations to the legislative history in *NRDC* v. *Train*, 510 F.2d 692, 709-10 (D.C. Cir. 1975); Ark. Br. at 19-22; AMSA/Municipal League Br. at 8. The consultative mechanism of sections 402(b)(5) and 401(a)(2) were enacted to resolve those few interstate disputes that might arise despite the uniform federal requirements.

interpretation and require automatic application of downstream state standards. *See* 40 C.F.R. §§ 122.4(d), 122.44(d)(4). However, these regulations merely confirm that permitting agencies must require compliance with any "applicable water quality requirements" of downstream states, without determining which of those requirements will, in fact, be applicable in any given case. Like section 401(a)(2), therefore, these regulations are consistent with section 402 and maintain EPA's discretionary authority to decide which downstream standards, based on a case-by-case consideration of all relevant factors, should be applied to a particular discharge.

This is precisely the interpretation offered by EPA when adopting its regulations on water quality standards. At that time, EPA explicitly stated that it would resolve interstate water quality disputes on a case-by-case basis, considering all the relevant factors:

> While it is theoretically possible that two States might have incompatible standards, both of which meet the requirements of the Act and this regulation, such a situation is likely to be rare. If it occurs, EPA will assist the States in resolving the inconsistency. The exact procedures will depend upon the specific circumstances. Therefore, we do not believe it is appropriate to include specific procedures in the Water Quality Standards Regulation to resolve interstate conflicts.

48 Fed. Reg. 51,413 (1983).[13] Respondents offer nothing

[13] Even if EPA's regulations were read to have a broader effect, they could not change the fact that Congress specifically gave EPA the discretion to determine in each case whether and how a facility should be required to satisfy downstream standards. Consequently, even if the regulations were somehow read to mean that EPA will generally find downstream standards "applicable," the agency still retains its full discretion under § 402 to consider and interpret those standards, *see* Ark. Br. at 31-33, as well as to depart from such a presumption of applicability in any individual proceeding. *See, e.g., United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 204-05 (1956).

to suggest that the cited regulations should be construed differently, or given any broader effects in this case.[14]

Accordingly, in light of the plain statutory language and need for a balanced approach, this Court already rejected respondents' and the Tenth Circuit's construction of the Act just four years ago in *Ouellette*. In particular, the Court held that sections 402 *and* 401 give downstream states only an "advisory role" in regulating an out-of-state discharge, whereas the EPA Administrator is delegated "the discretion to disapprove the permit if he concludes that the discharges will have an undue impact on interstate waters." 479 U.S. at 490-91; *see also* Ark. Br. at 17-18. Respondents' attempt to dismiss this Court's prior construction as "dicta" does not make this Court's interpretation go away, of course. Okla. Br. at 19 n.16. Moreover, respondents' characterization is wrong. In fact, the Court's construction of sections 402 and 401 was essential for its holding that these provisions preempt the application of a downstream state's common law. Under the preemption doctrine, the Court was first required to interpret these CWA provisions allocating

[14] Moreover, any EPA regulation that made downstream standards automatically applicable would constitute an abdication of the role Congress specifically entrusted to EPA as mediator of interstate water quality disputes. Furthermore, since the federally-approved standards remain state law, and their extra-territorial application to other states requires clear Congressional authorization as a matter of constitutional law, *see* Ark. Br. at 27; Nevada Br. at 13-14, such a rule would be highly questionable under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). *See* Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2110-14 (1990) (*Chevron* deference is not appropriate when an *agency* adopts a rule on its own that requires clear *Congressional* authorization); *see also EEOC* v. *Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1237 (1991) (Scalia, J., concurring) (citing Sunstein); *Rust* v. *Sullivan*, 111 S. Ct. 1759, 1780 (1991) (Blackman, J., dissenting) (citing Sunstein); *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court has also recognized that less deference should be given to an agency construction that conflicts with an earlier interpretation by this Court. *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 110 S. Ct. 2759, 2768 (1990); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989).

into interstate waterways before it could determine whether those provisions conflicted with, and hence preempted, the application of a downstream state's common law. Based on the Court's conclusion that downstream state standards do not apply extra-territorially under the CWA, the Court then concluded that the extra-territorial application of a downstream state's common law also must be preempted, for otherwise the downstream state would be allowed to do indirectly what it cannot do directly. 479 U.S. at 490-91, 495. Given the clear and unequivocal expression of Congressional intent required by this Court to make such a preemption holding,[15] respondents can scarcely support any other construction of the Act in this case.

D. This Court Should Uphold The Fayetteville Permit Based on EPA's Discretion Whether To Apply Downstream Standards.

Since the CWA gave EPA discretion whether to require compliance with the Oklahoma standards at all in this case, EPA necessarily also had broad discretion in interpreting and applying those standards here. Thus, had the Tenth Circuit properly interpreted the CWA's interstate provisions and recognized this broad discretion, it could never have overturned EPA's decision to issue the Fayetteville permit. *See* Ark. Br. at 31-33.

EPA now modestly suggests in its reply brief that this Court can reverse the Tenth Circuit and uphold the Fayetteville permit without needing to address the general applicability of downstream state standards under the CWA.[16] While this conclusion is undoubtedly correct, for the series of reasons addressed in EPA's brief and in

[15] This Court requires that the intent of Congress be "clear and manifest" before finding that a federal statute preempts state law. *California* v. *FERC*, 110 S. Ct. 2024, 2029 (1990); *Puerto Rico Dep't of Consumer Affairs* v. *Isla Petroleum Corp.*, 485 U.S. 495, 499-500 (1988); *Ouellette*, 479 U.S. at 491; *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[16] EPA Reply Br. at 7-8. The Court could not, however, affirm the Tenth Circuit's decision without reaching these broader issues.

Section II of this brief, there certainly is no reason for this Court to stop short of deciding the central question presented here. This Court has already decided that question once in *Ouellette*, as described above, and failing to reaffirm that decision here would create widespread uncertainty and turmoil. The Tenth Circuit, for example, felt free to disregard the *Ouellette* interpretation, and the court of appeals' decision is now being extended in other regions of the country. Accordingly, this Court should reaffirm its *Ouellette* interpretation to provide the simplest and most straightforward basis for decision here, clarify the responsibilities of all states under the CWA, and prevent disruptive interstate disputes from multiplying in the future.

II. EVEN IF DOWNSTREAM STANDARDS WERE AUTOMATICALLY APPLICABLE, THE COURT OF APPEALS SHOULD NOT HAVE OVERTURNED THE PERMIT IN THIS CASE.

As EPA and Arkansas both demonstrated in their opening briefs, even if downstream standards do automatically apply to out-of-state sources, the Tenth Circuit's decision in this case must still be reversed on several independent grounds and the Fayetteville permit upheld.

A. The CWA Delegates To EPA The Discretion To Determine Compliance With Downstream Standards.

Respondents and their amici offer no credible basis for rejecting the two independent sources of discretion under the CWA that authorized EPA to find that the Fayetteville discharge complies with Oklahoma standards. First, even if the Oklahoma standards did apply automatically, EPA must be responsible for defining the term "compliance" as used in the CWA. *See, e.g.*, CWA § 401(a)(2); 40 C.F.R. § 122.4(d). As a matter of federal law, EPA defined that term here to include an element of detectability and concluded that the Fayetteville discharge would comply with the Oklahoma standards so long as it did not have any detectable impact on downstream water quality. *See* Ark. P.A. at 117a n.16; EPA

Br. at 18 n.21; Ark. Br. at 34-36. Respondents object to EPA's definition of compliance by citing cases holding that the CWA does not require a permit violation to be "detectable" or a prohibited discharge to be "harmful." Okla. Br. at 24-25; OWF Br. at 10 n.7. These cases, however, deal with entirely different contexts in which the agency simply used alternative means for objectively determining the Act's requirements. In the instant context, EPA reasonably concluded that an objective test such as detectability was necessary to assess compliance with Oklahoma water quality standards, consistent with well-established judicial precedent.[17] Such objective criteria are especially necessary for demonstrating compliance with water quality standards, because of the complexity and uncertainties in modelling or measuring the effects of particular discharges on water quality many miles downstream.[18]

Second, the CWA also gives EPA, as a matter of federal law, the discretion to interpret state water quality standards in the interstate context. As *Ouellette* unquestionably does hold, a downstream state's standards can apply to out-of-state sources only through federal law. The state standards cannot apply, of their own force, beyond the adopting state's borders. Consequently, when downstream standards are applied in the interstate context, they must be subject to federal interpretation. Moreover, Congress' delegation of responsibility to EPA necessarily carries with it the included authority to interpret the downstream standards that the agency applies in the interstate context.[19] This is particularly

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[17] *See, e.g., Paccar, Inc.* v. *NHTSA*, 573 F.2d 632, 644 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978); *Chrysler Corp.* v. *Dep't of Transp.*, 472 F.2d 659, 675 (6th Cir. 1972). *See also Air Pollution Control Dist. of Jefferson County, Ky.* v. *EPA*, 739 F.2d 1071, 1092 (6th Cir. 1984).

[18] *See EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 204 (1976).

[19] If nothing else, section 401(a)(2) gives a federal permitting agency the authority to interpret downstream standards. While it

true where the state standards are based on federal models published by EPA, as is the case here. *See* EPA Br. at 20 n.25; Ark. Br. at 37. As shown in the opening briefs and demonstrated again below, EPA reasonably exercised this discretion in finding that the Fayetteville discharge would comply with all the Oklahoma standards.

B. Federal Law Does Not Require A Ban On New Discharges.

The Arkansas petitioners' opening brief further demonstrated that there is no basis for the Tenth Circuit's holding that the CWA requires a ban on all new discharges upstream from a pre-existing violation of a water quality standard. *See* Ark. Br. at 42-49. Indeed, respondents and their amici do not even attempt to defend the Tenth Circuit's novel interpretation of the CWA as requiring a generic permit ban upstream from any water quality violation. Rather, they offer an alternative theory that the federal antidegradation policy for outstanding national resource waters (ONRWs) requires an absolute ban on new discharges into such waters or their tributaries. Okla. Br. at 35-36. EPA's regulations impose no such ban on new discharges. On its face, and as its very name indicates, that policy simply prohibits "degradations" and requires only that "water quality shall be maintained and protected." 40 C.F.R. § 131.12(a)(3). Thus, a new discharge that will have no detectable effect on water quality, such as the Fayetteville discharge, is plainly not prohibited by EPA's antidegradation policy.[20]

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is the source state that certifies compliance with its standards under section 401(a)(1), it is the federal permitting agency that has the ultimate decisionmaking power under section 401(a)(1) to consider what requirements to impose to protect the water quality of downstream states.

[20] Respondents are also mistaken in contending that the Fayetteville 201 Facilities Plan Environmental Information Document and the findings of the Arkansas-Oklahoma Arkansas River Compact Commission call into question EPA's finding that the Fayetteville discharge will have no detectable impact on Oklahoma water quality. To the contrary, Dr. Thompson, representing the private consulting organization that drafted the 201 Plan document, testified that the only Oklahoma water quality standard the Fayetteville discharge would possibly violate is a prohibition against all new discharges, *assuming* such a prohibition applies to Arkansas; and, he testified that the Fayetteville discharge would have no measurable effect at the Oklahoma border. R., Vol. VII, Dkt. No. C-1 (Vol. II), at 246-47, 282-83. Similarly, the Compact Commission report only discussed the *potential* increase in phosphoros loading to the Illinois River (R., Vol. X, Dkt. No. OWF-1, at 20), and ended up rejecting Oklahoma's claim that Arkansas was violating the Compact by adversely affecting Oklahoma water quality. *Id.* at 25.

While EPA has never elaborated the requirements of its antidegradation policy in a national rulemaking, several EPA regional offices have produced guidance documents, reviewed by EPA headquarters, which confirm that the federal policy imposes no such ban on new discharges.[21] Moreover, even if the federal antidegradation policy were to require an absolute ban on new discharges directly into an ONRW, it is clear that such a restriction would never apply to *tributaries* of an ONRW.[22] In this case, Fayetteville discharges into a tributary of a tributary of a tributary of the Illinois River, which Oklahoma has designated a scenic river after it crosses the Oklahoma

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[21] *E.g.*, EPA Region V, *Guidance For AntiDegradation Policy Implementation For High Quality Waters*, at 4-5 (Dec. 3, 1986) ("an increased pollutant load" does not constitute "a lowering of water quality . . . if the increase is so small that no significant change in water quality can be demonstrated"); EPA Region 9, *Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12*, at 4 (June 3, 1987) ("If the action will not lower water quality, no further analysis is needed and EPA considers 40 CFR 131.12 to be satisfied"). *See also Commonwealth Edison Co.* v. *Train*, 649 F.2d 481, 485 (7th Cir. 1980).

[22] Although some other EPA regions would appear to ban new discharges *directly* into an ONRW, even those regions do not prohibit new discharges into a tributary of an ONRW. *See, e.g.*, EPA Region IV, *Question and Answers on Implementation of Tier III of the Federal Antidegradation Policy: Protection of Outstanding National Resources Waters*, at 2 (April 20, 1989) ("New point source dischargers are allowed to waters tributary to ONRW's as long as the discharge will not result in a lowering of water quality as the tributary waterbody enters the ONRW basin or cause a change in the essential character or special use which makes the water an ONRW.").

border. Thus, there is no basis whatsoever under federal law for prohibiting the Fayetteville discharge.

C. The Oklahoma Antidegradation Standard Also Does Not Prohibit The Fayetteville Discharge.

Respondents and their amici also offer no valid ground for denying the Fayetteville permit under any reasonable reading of Oklahoma state law. As an initial matter, the Tenth Circuit identified several alleged errors made by EPA's Administrative Law Judge (ALJ) in applying Oklahoma's standards. Ark. P.A. at 45a-46a, 51a-53a. Respondents and their amici do not contest petitioners' demonstration that these alleged errors were either nonexistent or harmless, and thus do not affect the validity of EPA's decision to approve the permit. Ark. Br. at 38-41.[23]

Unable to defend the Tenth Circuit's decision on these grounds, and unwilling to defend the court's "permit ban" holding as a construction of the federal CWA, respondents instead attempt to recharacterize the court's holding as based on Oklahoma's individual antidegradation stand-

[23] Although respondents do offer an attack on the ALJ's eutrophication findings, this attack merely repeats the Tenth Circuit's error of misinterpreting the ALJ's findings. Specifically, the Tenth Circuit accused the ALJ of committing a "glaring error" by allegedly concluding that nutrient uptake by algae reduces the rate of eutrophication. Okla. Br. at 23 n.21; Ark. P.A. at 68a-69a n.47. In fact, the court simply misread the relevant sentence in the ALJ's opinion, and Oklahoma never even mentioned this issue in any of the proceedings below. The ALJ actually stated that at low flows, "the assimilative processes is [sic] at its most effective stage and therefore removes more nutrients upon which algae feed before they reach the Oklahoma border." Ark. P.A. at 129a. Properly read, and as confirmed by the evidence cited in the rest of the ALJ's decision, this sentence simply recognizes that, in low flow situations, nutrient assimilation is enhanced, thereby lowering the amount of nutrients reaching the border and consequently reducing algal growth. In other words, consistent with the testimony at the hearing, it is the natural assimilative processes of the river, and not algal growth, which the ALJ concluded would reduce the rate of eutrophication. *See* R., Vol. VII, Dkt. No. C-1 (Vol. II), at 309.

ard. In particular, respondents contend that the Tenth Circuit gave Oklahoma's standard a dual meaning depending on whether or not the downstream waters are already degraded. *See, e.g.*, Okla. Br. at 30. As shown above, there is no basis for this dual meaning or permit ban in the CWA or federal antidegradation policy. *See infra* pages 16-17. Respondents' opportunistic attempt to engraft this interpretation on its own standard also lacks any foundation. Oklahoma never advanced such an interpretation in the proceedings below, and there is absolutely no suggestion on the face of the standard that it has two meanings depending on whether or not there is existing degradation.

Apart from proposing this novel recharacterization, respondents offer their own theory that the Oklahoma antidegradation standard absolutely prohibits any new discharge, regardless of pre-existing conditions. The standard also cannot support this interpretation, since its language only prohibits "degradation" of an ONRW; it says nothing about banning new discharges that will not degrade water quality. J.A. at 28. Indeed, even the Tenth Circuit would not accept this view and instead interpreted Oklahoma's standard to prohibit only new discharges that result in "any human-caused, *detectable* change" in water quality. Ark. P.A. at 49a (emphasis added).

Moreover, the Beneficial Use Limitations (Section 5) of the 1982 OWQS only designate "scenic river areas" and "such tributaries of those streams as may be appropriate" as being subject to "(a)" protection for ONRW waters. J.A. at 46-47. These limitations therefore do not even apply to unlisted tributaries, and Oklahoma's 1982 standards clearly did not designate the Arkansas tributaries of the Illinois River in question here as being subject to the ONRW protections. 1982 OWQS, App. A, J.A. at 54.[24] Indeed, Oklahoma itself interpreted its 1982 stand-

[24] In 1985, Oklahoma did revise the OWQS to extend ONRW protection to all tributaries of scenic rivers. However, the 1982

ards in this manner as the basis for permitting an increased load for the Tahlequah, Oklahoma wastewater treatment plant.[25]

Finally, even if the Oklahoma standard did prohibit all new discharges, going far beyond the federal minimum requirements, it would constitute a more stringent state standard adopted under section 510 of the CWA and as such, must only apply to in-state dischargers. *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 328 (1981); *see also* Ark. Br. at 25-27.[26]

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and the permit approved by EPA should be reinstated.

OWQS, and not the 1985 OWQS, apply to the Fayetteville permit. Ark. P.A. at 45a n.29. Moreover, when EPA approved the 1985 OWQS which extended ONRW status to tributaries, EPA expressly limited this extension to "streams or portions of streams within the boundaries of Oklahoma." Letter from Myron O. Knudson, Director, Waste Management Div., EPA Region VI, to James Barnett, Executive Director, Oklahoma Water Resources Bd. (Sept. 15, 1986), R., Vol. VIII, No. EPA-6, at 3.

[25] *See* Letter from Lawrence R. Edmison, Director of Oklahoma Dep't of Pollution Control, to Myron O. Knudson, Director, Waste Management Div., EPA Region VI (May 29, 1986). R., Vol. VIII, Dkt. No. EPA-5. Oklahoma subsequently changed its position in light of its opposition to the Fayetteville discharge and the 1985 modifications to the OWQS.

[26] A similar dichotomy exists for interstate pollution abatement under the Clean Air Act. Courts have concluded that an upwind state must protect against interference with the air quality standards of the downwind state that are based on federal requirements, but is not required to comply with downwind state standards that are more stringent than the requirements of federal law. *Connecticut* v. *EPA*, 656 F.2d 902, 909 (2d Cir. 1981); *Air Pollution Control Dist. of Jefferson County, Ky.* v. *EPA*, 739 F.2d 1071 (6th Cir. 1984).

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